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No. ~~2737~~.

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Wong Back Sue,
Appellant,

vs.

Charles T. Connell, as Immigration Inspector in Charge,
Appellee.

APPELLANT'S BRIEF.

DUKE STONE,
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STATEMENT.

This is an appeal by Wong Back Sue from an order [pages 8 and 9 of Transcript] denying his petition for a writ of habeas corpus, which set out substantially the following facts, viz.: That petitioner was unlawfully restrained of his liberty by the appellee, immigration inspector, and that said appellee held petitioner pursuant to a warrant issued by the secretary of labor, which charged that appellant entered the United States at Calexico, California, in violation of section 7, Chinese Exclusion Act, being a Chinese laborer who failed to produce to the proper officer the return certificate required by said section [pp. 9 and 10 of Transcript].

No return to the petition was made, though there was an appearance on behalf of appellee, but the court on the petition and what is termed in the order denying the petition as "a transcript of the hearing before the immigration officials of the government," denied the petition.

It will not be disputed that there was issued to petitioner on March 31st, 1894, a certificate of residence and of which he was possessed at the time he was arrested for deportation. This allegation of the petition is not denied and is supported by uncontradicted evidence taken at the hearing on which the warrant was issued. [P. 13 of Transcript.]

The contentions of appellant are:

(a) There was not a fair hearing accorded him by the immigration officials.

(b) There was absoluetly no evidence that petitioner entered the United States near Calexico, California, on or about December 18, 1914, as charged in the warrant, or at any other time or place without inspection.

(c) There was absolutely no evidence that petitioner entered the United States at any time or place in violation of section 36, rule 13, of the Act of Congress, as amended by the act approved March 26, 1910, or that he had entered in violation of section 7, Chinese Exclusion Act of September 13, 1888, and

(d) If petitioner deserved deportation, then it should be to Mexico, being the country from whence it is the claim of the government he came or entered the United States.

ARGUMENT.

The warrant [pp. 9 and 10 of Transcript] was read to petitioner at Yuma, Arizona, January 24, 1915 [p. 12 Transcript], whereupon he seems to have been very thoroughly questioned, and from which it appeared that a certificate of residence (No. 95,243) had been issued to petitioner March 31, 1894, and at which time certain statements hereinafter referred to were shown him; and from all of which it appears that he never was in Calexico, California.

After this grilling examination had closed, the immigration officer [p. 21 of Transcript] for the first time advised him that he was entitled to counsel.

Said statement of petitioner [pp. 12 to 21, inclusive, of Transcript] nowhere shows that he entered the United States at Calexico, California, or any other place without inspection, or without producing a proper return certificate.

The close, grilling examination was given petitioner and thereafter he was confronted with certain purported statements. The train inspection card [p. 50 of Transcript], while a portion of the record on which deportation was ordered, was never at any time identified by the party purporting to sign it. It would not be admissible in evidence in an ordinary civil case involving a meager sum. Inspector Palmer was not produced or accounted for. It is not the case of where an *ex parte* statement is fully identified and then offered as was sustained in the case of Healy v Backus, 221 Fed. R. 358.

The charge against petitioner was that he unlawfully entered the United States at Calexico, California, on or about December 18, 1914, being a Chinese laborer who failed to produce the return certificate.

The only possible claim to support this is the statements of some parties who say they at one time saw the party, who was represented by a picture claimed to be that of petitioner, in or near Mexicali, Mexico. There is no statement of any kind from anyone that he entered the United States at Calexico, or that he failed to produce a return certificate, if he entered there. Why was not the immigration officer at Calexico produced to prove the charges? Having charged that he entered at this place without inspection, the burden to offer at least some proof of the fact was necessary.

The evidence is not sufficient to identify the picture referred to as the picture of the petitioner. The picture identified by petitioner is not with a fair degree of clearness shown to be that of petitioner.

Re Bun Chaw, 220 Fed. R. 387.

There was no sufficient evidence in the case at bar to overcome the legal effect of the certificate issued to him March 31, 1894.

Li Hop Tong v. U. S., 209 U. S. 453.

It has also been held that if the examination was unfair before the immigration inspector, then the hearing before the secretary was also unfair, and that deportation should not be had.

U. S. v. Ruiz, 203 Fed. R. 443.

Under the law, the petitioner, if he was out of the United States (holding the certificate of residence, as he did, in the United States), had a right to re-enter the United States at a designated point, of which Calexico is one. This right is only limited to *inspection.*

Should there not be some evidence of an entry in the manner charged?

The statement of Inspector Palmer and others not taken at the time of the hearing should not in any way be considered.

Whitefield v. Hanges, 222 Fed. R. 751;
McDonald v. Sin Tok Sam, 225 Fed. R. 710;
Ex parte Sati, 215 Fed. R. 173;
Ex parte Lam Tuk Tak, 217 Fed. R. 468.

These *ex parte* statements not made in the presence of the alien were apparently held harmless in Healy v. Backus, 221 Fed. R. 358, upon the ground that in that particular case there was other sufficient, pertinent testimony to sustain the order of deportation.

By immigration rule 13, Calexico is, among other places (under section 36 of the Immigration Act), made a port of entry. The sole charge against the petitioner is an entry at this port without producing to the officer his return certificate. How easy it would have been to have produced the officer or his records to prove this.

The government claims that he was seen on a ranch near Mexicali a short time before his arrest, and even if this be true it is entirely possible for him to have

entered the United States at one of the other border ports designated under said rule 13, and proof was certainly easily obtainable by the government from these ports to at least, in some measure, prove the failure to produce a certificate.

This is especially true in a case like this, where he produced a valid certificate of residence which had fixed his status in the United States for more than twenty years previous to his arrest. The burden in such cases is on the government to produce at least some little evidence to prove a wrongful re-entry, which was not done in the case at bar. This is made plain by section 36 of the Immigration Act, which provides:

> "That all aliens who shall enter the United States, *except* at the seaports thereof, or *at such other place or places* as the Secretary of Commerce and Labor may from time to time designate, shall be adjudged to have entered the country unlawfully, and shall be deported, as provided by sections twenty and twenty-one of this act."

It therefore appears that an entry at any port designated by the Secretary of Commerce and Labor (in this instance Calexico) is presumptively lawful. It is alleged that petitioner entered at this port. It is admitted or proven by the government's evidence [p. 13 Transcript] that he had a valid certificate of residence when arrested; but not a scintilla of evidence that he entered at Calexico, or if he did, that he failed (in violation of section 7 Chinese Exclusion Act of September 13th, 1888) to produce a return certificate.

It is therefore respectfully submitted that as petitioner was charged with entry into the United States at a designated port (at which he had a right to enter upon producing a certificate), that he cannot be deported without a scintilla of proof to sustain the charge.

Ex parte Lam Prie, 217 Fed. R. 456.

It is next respectfully submitted that if the government's contention be correct, that the petitioner entered from Mexico, then he should be deported to Mexico.

The status of petitioner was fixed by the issuance to him of the certificate of residence, of which he had been possessed for more than twenty years, as a right of great importance. He had gained a valuable right apart from his native country, and should therefore have been deported (if there was any legal evidence, upon a fair hearing, that he had *entered at Calexico*, and *without inspection*) to the country from whence he came to the United States. His admitted long residence in this country, and residence near the boundary of Mexico, is certainly entitled to some consideration. This is what was intended by sections 20, 21 and 35 of the Immigration Act of 1907. The language provides:

> "That the deportation of aliens arrested within the United States after entry and found to be illegally therein, provided for in this act, shall be to the transpacific or transatlantic ports from which aliens embarged for the United States, *or, if such embarkation was from foreign contiguous territory, to the foreign port at which such aliens embarked for such territory.*"

Our contention as to the construction on the above section is sustained by the following authorities:

Ex parte Gytl, 220 Fed. R. 918;
U. S. v. Redfern, 186 Fed. R. 604;
U. S. v. Ruiz, 203 Fed. R. 441;
U. S. v. Sisson, 206 Fed. R. 450;
U. S. v. Redfern, 210 Fed. R. 548.

It certainly could not be contended that petitioner had lived in China for, at the least, 25 years prior to his arrest. His status was fully fixed by his long association and certificate of residence. These facts did not exist in Frick v. Lewis, 58 L. Ed. 967, and that case is not controlling in the case at bar.

The certificate of residence issued by the government of the United States to petitioner on March 31, 1894, fixed upon him a legal status which he might or could lose or forfeit by failing to produce the return certificate; but his failure (if there was such) placed his domicile in Mexico, where it is contended he lived and labored, and hence Mexico was the country from whence he came after he had lost or forfeited what this government had given him.

No such condition existed in Frick v. Lewis, *supra.*

It is therefore respectfully submitted that the order should be reversed and petitioner discharged, or his deportation ordered to Mexico.

Respectfully submitted,

DUKE STONE,

Attorney for Petitioner and Appellant.